

TAMING LEVIATHAN: WILL THE CENTRALIZING TIDE OF THE TWENTIETH CENTURY CONTINUE INTO THE TWENTY-FIRST?

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This Centennial Celebration emboldens me to offer some sweeping observations about the path of American law and government over the past 100 years. We can expect that in 2100 the editors of the *Southern California Law Review* will publish yet another commemorative issue in conjunction with the Bicentennial Celebration of the University of Southern California Law School.¹ The legal scholars who will contribute to Volume 174 of the *Law Review* are unlikely to have much use for the work of those of us whose works fill Volume 74. They will regard us as both unsophisticated in method and archaic in substantive focus. Nonetheless, legal historians active in the twenty-second century will be curious about how law professors of our era assessed the general direction of legal change during the twentieth century. Now that I am only a year or two away from eligibility for the price discounts that many business establishments offer to seniors, perhaps my contemporaries will forgive my offering some Olympian comments without the customary amount of supporting argumentation and footnoting.

Two portentous trends of twentieth-century American law were the vast increase in governmental regulation and spending, and the increasingly

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1. Law journals, of course, may become technologically obsolete well before then. See Bernard J. Hibbits, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 616–17 (1996).

dominant role assumed by the federal government.² In this brief essay I seek to: (1) document this growth in government; (2) argue that—as a global proposition—American society presently suffers from too much law and government; (3) discuss the causes of this overgovernment; and (4) speculate on whether Leviathan is destined to become even plumper in the future. To add concreteness to what otherwise might be an overly general discussion, I invoke examples from two of my specialties: land use regulation and housing policy. (Because the issue of federalism presently receives ample scholarly attention, I say little about the national government's growing dominance during the twentieth century.³)

What follows hardly is a screed against all governmental activity. An effective public sector has been shown to be a prerequisite for economic development.⁴ My normative thesis is not that governments should relinquish all their activities, but simply that, in many policy contexts, they should scale them back.⁵

2. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 655–95 (2d ed. 1985). See also *THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* (Michael D. Bordo et al. eds., 1998) [hereinafter *THE DEFINING MOMENT*] (depicting the growth of government, particularly the federal government, during the New Deal).

3. The principle of subsidiarity calls for the assignment of a governmental function to the smallest unit capable of handling it. Cf. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–511 (1987) (summarizing the virtues of federalism). The Supreme Court can take credit for bringing states' rights back into fashion. Various Court decisions during the latter half of the twentieth century helped rid the states of antidemocratic practices. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding seats in both houses of a state legislature must be apportioned on the basis of population); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (holding poll tax violated the Equal Protection Clause). With that work done, the Court later could re-embrace the formerly disgraced notion of the primacy of state law in particular substantive areas. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress lacked power under the Commerce Clause to regulate the possession of firearms in or around local schools); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that portions of the 1994 Violence Against Women Act exceeded Congress' powers).

4. Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *The Quality of Government*, 15 J.L. ECON. & ORG. 222 (1999) (reporting results of a sophisticated empirical study that cast doubt on any general thesis that a bigger government necessarily is bad for economic development). The theory of public finance anticipates that a government can usefully involve itself in a market economy by providing a legal system that facilitates private exchange, addressing problems arising from externalities, supplying public goods (activities that generate positive externalities), providing a social safety net, and so on. See generally HARVEY S. ROSEN, *PUBLIC FINANCE* (5th ed. 1999).

5. In fact, I support an expansion of land-use regulation in selected contexts that involve pervasive externalities, for example, (1) to help ensure that a new subdivision's streets mesh with the layout of existing streets; (2) to prevent the construction of street gates that impede access to multiblock residential areas; and (3) to control visual pollution arising from subnormal signage or landscaping on private lands that abut well-traveled highways.

To contribute to the spirit of the occasion that gave rise to this symposium, I should credit the role that the USC Law School played in the evolution of my views. I spent my youth in the District of Columbia, the son of two parents who had moved to Washington in the 1930s to take part in the work of the New Deal—the key centralizing event of the twentieth century. The prevailing sentiments at Oberlin College and the Yale Law School, where I pursued higher education, seldom offered much challenge to the Progressive ideology that both my parents had espoused. Nevertheless, a few professors—notably Aaron Wildavsky and Robert Pollak at Oberlin, and Charles Reich and Robert Bork at the Yale Law School—presented ideas that began to make me more skeptical about the New Deal faith. Perhaps the seminal event in my educational career occurred during my third year of law school when I wrote a long paper on government housing assistance programs. It was plain by the mid-1960s that many public housing projects were turning out badly. I found that economists could offer the most plausible theory of why private firms could build and manage housing better than governments could. By the time I had graduated from law school in 1966, I had lost much of my faith in the relative competence of government.

Eye-opening experiences outside of school also were influential. For a few days around the time of my twentieth birthday, I visited Leningrad in the company of two high school friends. There is no better advertisement for small government than a visit to a communist police state. The advantages of decentralized systems became yet more evident when two college friends and I spent much of the summer of 1966 building a vacation house in rural Vermont. Whenever we needed to purchase something unusual, such as backhoe services, concrete pipe for the well casing, or milled redwood window jambs, we found that some tiny supplier in the greater Brattleboro, Vermont area indeed was able to provide it. As we built the house, we were at the mercy of the reputed invisible hand. And it did not fail us.

My eleven years of teaching at the USC Law School solidified my inclination to prefer the decentralization of power. I joined the USC faculty in 1970. The environmental movement was in full flower and the Nixon Administration was busily fulfilling its ironic role of putting into place the Johnson Administration's ambitious social welfare programs. Support for this spurt in government activity, however, then was less prevalent among the members of the USC law faculty than it was at other law schools. One reason, perhaps, may have been self-selection; as a private university, USC, as compared to UCLA, likely attracted faculty

members relatively unenamored with the public sector. More important, largely by historical accident, in 1970 the USC professoriat was stunningly young. The median age of the tenure-track faculty at the law school was thirty-three, barely above my own age of twenty-nine. Freshly minted professors tend to be particularly attuned to rising intellectual trends. And, as it happened, 1970 was roughly the takeoff point for law and economics.⁶

Because of my experiences in analyzing housing policy, I had arrived at USC primed to employ the law and economics paradigm. My new colleagues strongly encouraged me to follow this inclination. Particularly influential were three quite different but unusually strong-willed contemporaries, all of whom were still in their twenties. These were Scott Bice, a natural leader blessed with superb judgment and a refreshingly universal skepticism; Richard Epstein, an intrepid dynamo eager to extend his irrepressible libertarianism into every policy domain; and Michael Levine, a high-horsepower intellect with a confident command of economics and strong deregulatory inclinations. Most law professors, then and now, are centralizers. They desire, at least at the margins where legal policy is in flux, to expand the role of government, especially the role of the cynosure of the legal academy, the federal government. In contrast, my years at USC cemented my preexisting inclination to shift power, at the margin, from higher-level governments to lower-level governments, and beyond that, from governments to the people involved in yet more diffuse institutions such as markets and civil society.

I. THE GROWTH OF GOVERNMENT REGULATION AND SPENDING DURING THE TWENTIETH CENTURY

Basic governmental activities include (1) the establishment of private law (that is, the background legal rules and institutions that help enable private ordering); (2) the issuance and direct enforcement of regulations governing private activity; (3) the making of grants and transfer payments; and (4) the management of public enterprises and assets. The twentieth century is notable for the expansion of government in all four of these areas.

6. In 1970–1971, Henry Manne first started to recruit law professors to his law and economics summer camp (Pareto in the Pines). Two founders of law and economics, Guido Calabresi and Richard A. Posner, were also bursting into prominence. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970), drew great acclaim. Among Posner's more prominent early works were *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969), and *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971).

A. IN GENERAL

In 2000, both private and public law are complex beyond the imagination of lawyers practicing in 1900. A crude measure of the expansion of law is the growth of statutory and regulatory materials. In 1928, the unannotated version of the United States Code appeared in two tall volumes that totaled six inches in width.⁷ The 1988 version of the unannotated Code included twenty-nine volumes that spanned six feet, a twelve-fold increase. Title 42 of the Code (which at first dealt with Public Health and later also with Welfare) expanded from twelve pages in 1928 to 5,227 pages in 1988. The output of federal regulations also has soared. The number of pages printed in the Federal Register rose from 2,411 in 1936, to 15,000 in 1961, to 67,716 in 1991.⁸ In 1900, there was no federal income tax. A century later, this tax has given rise to 684 forms and 17,000 pages of statutes and regulations.⁹

State and local law also have grown like kudzu. At the start of the twentieth century, the annotated California general statutes were compiled into 4 one-volume Codes—namely, Civil, Civil Procedure, Penal, and Political—which together took up about nine inches of shelf space.¹⁰ At the end of the century, there were twenty-nine annotated California Codes, whose volumes occupied about thirty-six feet of shelf space, almost a fifty-fold increase.¹¹ What about local law? Between 1800 and 1900, New Haven evolved from a town of 5,500 into a small industrial city of 108,000. Despite the great increase in the city's density and technological complexity, the New Haven municipal code grew by only 170 pages during the nineteenth century.¹² During the twentieth century, by contrast, when

7. U.S.C. COMPACT EDITION (West 1928). This is the earliest compilation available in the Yale Law Library.

8. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 7 (1995) (providing counts for 1936 and 1991); Peter L. Strauss, *Presidential Rulemaking*, 72 CHL.-KENT L. REV. 965, 969 n.20 (1997) (providing count for 1961). The Federal Register did not exist prior to the Federal Register Act, ch. 417, 49 Stat. 501 (1935) (codified as amended at 44 U.S.C. §§ 1501–1511 (1994)).

9. See Daniel J. Mitchell, *The Inevitability of the Flat Tax*, 48 EMORY L.J. 829, 830 (citing DANIEL J. PILLA, *WHY YOU CAN'T TRUST THE IRS* 2 (Cato Inst. Policy Analysis No. 222, 1995)).

10. CARTER P. POMEROY, *CODES AND STATUTES OF CALIFORNIA* (1901).

11. A calculation of the width of the volumes in *West's Annotated California Code*, including supplements, as of 1999.

12. In 1803, the city of New Haven had thirty-six pages of ordinances. CITY OF NEW HAVEN, CONN., *BYE LAWS* (1803). The number of pages of ordinances had increased to 206 by 1898. CITY OF NEW HAVEN, CONN., *CHARTER AND ORDINANCES* (1898).

New Haven's population rose by a mere 20%, its code lengthened by about 1,100 pages.¹³

The size of the legal profession is another measure of the extent of legalization of social and economic life. In 1951 (the start of the most reliable statistical series),¹⁴ the ratio of the U.S. population to the number of attorneys was 695:1.¹⁵ By 2000, when the number of attorneys was estimated to have exceeded one million, the ratio had fallen by over half to 267:1.¹⁶ The blue pages of the Martindale-Hubbell Law Directory suggest that in California the population-to-attorney ratio fell from 580:1 in 1900 to 374:1 in 1999.¹⁷ Between 1950 and 1991, the portion of gross national income spent on private legal services rose from 0.47% to 1.43%.¹⁸

A less reliable, but nonetheless telling, measure of the amount of law is the number of lawsuits per capita. A law may be widely honored, either voluntarily or on account of the possibility of its enforcement, without actual resort to litigation. Nevertheless, in the United States, litigation does appear to have become more frequent over the course of the twentieth century. Per capita, the number of civil suits filed in federal district courts quintupled over the course of the twentieth century.¹⁹ The upsurge was far less, however, in the state courts, which handle 98% of the nation's caseload. State courts have seen only a mild increase in per capita civil

13. The city's ordinances totaled about 1,300 pages in 1999. CITY OF NEW HAVEN, CONN., CODE, GENERAL ORDINANCES (1999). This increase occurred despite the repeal in 1981 of most of the city's building regulations in response to the State of Connecticut's preemption of that field.

14. Census counts indicate that the number of lawyers and judges per capita actually dropped between 1900 and 1970, and then rose sharply thereafter. See Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers?*, 14 L. & SOC. INQUIRY 431, 433 tbl.1 (1989). Prior to the latter portion of the twentieth century, the Census may have included justices of the peace in this category, despite their paucity of legal training. See *id.*

15. BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT 1 (1994) (reporting figures through 1991 and projecting figures thereafter).

16. *Id.*

17. About 2,560 attorneys were listed in the California sections of Martindale's *American Law Directory* of January, 1900. See J.B. MARTINDALE, AMERICAN LAW DIRECTORY (1900). The blue pages of the 1999 *Martindale-Hubbell Law Directory* include about 88,020 California attorneys. See 2-3 MARTINDALE-HUBBELL LAW DIRECTORY (1999). It is not obvious, however, that the criteria for inclusion in these directories remained constant over the course of the century.

18. See Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry Into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 836-37 (1995). For an assessment of this trend, see Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275 (1992).

19. Calculated from case data reported in RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 391-93 (1996).

filings, with divorce and tort cases accounting for most of this upswing.²⁰ Indeed, some studies suggest that the likelihood of litigation over certain private arrangements, such as a land transfer or business transaction, actually may have declined over the course of the twentieth century.²¹ This could mean that these transactions have become routinized, that contracting parties increasingly are relying on arbitration, or that the increasing effectiveness of reputational sanctions is inducing transactors to comply with governing norms more routinely than they had before. In any event, the trend toward legalization seems to be least pronounced among private parties with continuing relationships.

Trends in levels of government employment and revenue help reveal changes in the growth of governmental regulatory, spending, and enterprise programs. While federal, state, and local governments employed only about 4% of the American civilian work force in 1900,²² they employed about 16% in 1996.²³ As the century progressed, the burgeoning welfare state began to crowd out more decentralized mechanisms of social insurance such as the extended family, religious institutions, and private insurance. This is a major reason why taxes imposed by all levels of government rose from 8.5% of the national income in 1902, to 25.2% in 1950, to 35.2% in 1997.²⁴

B. TRENDS IN GOVERNMENT INVOLVEMENT IN LAND USE REGULATION AND HOUSING ASSISTANCE

Trends in my specialties illustrate the centralizing impulses that have prevailed during the twentieth century. In 1900, municipalities generally gave private developers wide range. To be sure, many cities imposed

20. See Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 37-43 (1983).

21. See *id.* at 42-43.

22. Calculated from data reported in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, H.R. DOC. NO. 93-78, at 126, 137 (1975).

23. Calculated from data reported in TAX FOUNDATION, *FACTS & FIGURES ON GOVERNMENT FINANCE* 23, 35 (Scott Moody ed., 32d ed. 1998). This percentage includes only persons on government payrolls, not the somewhat larger number of shadow workers whose jobs in the private sector depend on government grants and contracts. When shadow workers are included, federally created employment did begin to shrink a bit after 1984, but only on account of cuts in defense spending. See PAUL LIGHT, *THE TRUE SIZE OF GOVERNMENT* 177-78 (1999).

24. TAX FOUNDATION, *supra* note 23, at 12. Nonetheless, a 1996 study of twenty developed nations found that, as a percentage of national income, government spending in the United States was the lowest of all. See *id.* at 349 (reporting percentages of 33.3% for the United States, 36.2% for Japan, 49.6% for Germany, and 65.4% for Sweden).

regulations, in particular, building codes (which mainly addressed fire hazards and other threats to health and life safety), minimum setbacks for structures from streets, and possibly selective prohibitions on the siting of uses such as tanneries and livery stables. In addition, an unusually noxious activity might be enjoined as a nuisance or prohibited by an applicable private covenant. In 1900, however, no American city had a general zoning law and none regulated how subdividers laid out their tracts. When the pioneering Flatiron Building opened in 1901, virtually every owner of a sufficiently spacious Manhattan lot had the legal privilege of mimicking it.

Not any more. In 2000, land development is one of the most regulated American activities. Zoning, now nearly ubiquitous, has evolved into a system that essentially enables an ambitious municipality to veto any proposed private building project. In addition, subdivision regulations now govern developers' decisions about the width of streets, the length of blocks, and the presence of curbs. Building codes have gone far beyond concerns of health and safety, and govern such matters as energy efficiency and wheelchair accessibility. California, which regulates land use more than most states do, requires the preparation of an environmental impact report for a major development project, orders municipalities to prepare and honor a comprehensive plan, and imposes special state-level regulations on areas such as the coastal zone.²⁵ And recurrently there even are calls for greater federal involvement in land-use regulation.²⁶

The upshot: In 1900 a successful developer was someone who was skilled at satisfying consumer demands. Today, a successful developer is likely to be someone unusually skilled at moderating the demands of government officials.

The history of government housing subsidy programs also illustrates the century of change. In 1900, the federal government offered no housing assistance to the general population.²⁷ Most states did operate asylums for the mentally ill, and some cities supported almshouses for the chronically impoverished. Outside of these scattered institutions, however, govern-

25. For criticism of some of these, see George Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447 (1981).

26. In early 1999 Presidential candidate Al Gore urged federal financial support for local "smart growth" programs. Despite Gore's expansive rhetoric, his proposed program was exceedingly modest. The centerpiece was a proposed federal tax credit to support the issuance of less than \$10 billion in state and local bonds to assist acquisition of open spaces and other key land parcels. See Michael Janofsky, *Gore Offers Plan to Control Suburban Sprawl*, N.Y. TIMES, Jan. 12, 1999, at A16.

27. The modest federal housing aid programs then were aimed primarily at veterans. See PATRICK J. KELLY, *CREATING A NATIONAL HOME: BUILDING THE VETERANS' WELFARE STATE: 1860-1900*, at 230 n.5 (1997) (reporting that, in 1900, the National Home system assisted 18,814 veterans).

ments in the United States did not regard the production of housing or the subsidization of its purchase to be part of their mission.

Today all levels of government—especially the federal government—are up to their elbows in housing support for low- and moderate-income households.²⁸ The first landmark in federal project-based housing aid was the United States Housing Act of 1937,²⁹ which established the public housing program, taking nationwide New York's socialist model of government-built and managed housing. Another landmark was the Housing and Urban Development Act of 1968,³⁰ which boosted federal aid to projects sponsored by nonprofit and limited-profit housing developers. A third was the federal Tax Reform Act of 1986, which gave birth to the Low-Income Housing Tax Credit,³¹ currently a mainstay of federal housing assistance. Federal initiatives also fomented forays by lower-level governments. The federal tax exemption for interest payments received by holders of state bonds eventually lured all states into setting up housing finance agencies. The lure of federal subsidies induced most large cities to establish housing authorities to build and manage public housing projects. On their own, many state and local governments came up with property tax abatement programs, tax-increment-financed urban renewal, inclusionary zoning, and other subsidy systems largely invisible to the ordinary voter.

Few observers other than housing specialists are aware how great the cumulative effect of this accretion of government housing programs has been. In New Haven, I estimate that in 1900 less than 1% of households were receiving government housing assistance.³² By the end of the century, when the residents of New Haven generally had become vastly more prosperous, about 40% of the city's households were receiving housing aid,³³ with the fraction well over one-half in some of the poorer

28. For more details of the various programs, as well as of the Internal Revenue Code's numerous subsidies for middle-class housing, see ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 1047–70 (2d ed. 2000).

29. United States Housing Act of 1937, ch. 896, 50 Stat. 888 (codified as amended in scattered sections of 42 U.S.C. (1994)).

30. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476 (codified as amended at 12 U.S.C. § 1715z-1 and elsewhere (1994)).

31. Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 252(a), 100 Stat. 2035, 2189–203 (codified at I.R.C. § 42 (1994)).

32. Apart from police-provided housing to transients, the main beneficiaries were the inhabitants of New Haven's Springside Almshouse, which housed 383 people in 1898. See Benjamin M. Leff, *Springside Home: Creating a New Institution for the Poor in New Haven 1886–1889*, at 22 (May 11, 1998) (unpublished manuscript, on file with author).

33. This was the City's estimate for 1994. See CITY OF NEW HAVEN, *COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY* FY 1994, at 10.

neighborhoods of the city. Prior to the New Deal, market forces largely determined whether the owner of a lot in New Haven would build housing on it. Today, especially in poorer neighborhoods, a lot-owner's building projects are largely decided by the government officials who distribute housing largesse.³⁴

II. SOME EVIDENCE THAT GOVERNMENT HAS BECOME TOO BIG

It is patently perilous to offer normative generalizations about all governmental efforts. In addition to the federal government and the fifty states, there are some 22,000 counties and municipalities in the United States, each with its own set of programs. Moreover, commentators can nominate competing criteria for the assessment of a government's effectiveness—perhaps, to what extent it comports with a preferred vision of distributive justice, or with some civic-republican participatory ideal. Despite these hurdles, I venture to assert that, at the margin, most governments in the United States became too big over the course of the twentieth century.³⁵ My normative criterion for the most part is the pedestrian one of cost-benefit analysis.³⁶ I again focus on what I know best: a set of regulatory programs (land-use regulation) and a set of spending programs (housing assistance).

A government regulatory program conceivably can enhance efficiency, say, by controlling externalities that would not be internalized

34. Since 1974, more and more housing assistance has become tenant based, particularly in the form of portable Section 8 housing vouchers. Nevertheless, a majority of New Haven's subsidized households still receive aid through a project-based program.

35. See also MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962) (a landmark lament against the growth of government). For a more upbeat assessment of governments in action, see, for example, DONALD WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE* (1995). On the related issue of whether there are too many lawyers in the United States, see *Debate: Do Lawyers Impair Economic Growth?*, 17 L. & SOC. INQUIRY 585-711 (1992).

36. On the virtues and limitations of this evaluation procedure, see Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999). The factoring in of other normative considerations does not necessarily enhance the case for government activity. For example, an increase in government regulation tends to lessen liberty. Robert Hale once argued that, because a system of private property rights confers power on property owners, government regulation does not necessarily bring about a net loss of freedom. See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 625-28 (1943). See generally BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998). Hale's analysis ignores the fact that, when markets are competitive, a property owner lacks the monopoly power that a regulating government possesses. That is why the popular phrase runs, "You can't fight City Hall," and not, "You can't fight General Motors." You can fight General Motors if you readily can buy one of its competitors' products.

by contract or norm, or by limiting the exercise of monopoly power. Nevertheless, many late-twentieth-century regulatory programs commonly give rise to costs that surpass their benefits. These costs are of two stripes: the new misallocation of resources that a ham-handed government program causes, and the administrative costs that the program engenders. Although municipal zoning ordinances, for example, can have beneficial effects, many zoning regulations are inefficient.³⁷ Large-lot zoning in the suburbs, for instance, tends to aggravate urban sprawl, increase commuting burdens, and result in excessive segregation by social class. Similarly, municipal subdivision regulations commonly require overly wide streets and over-designed sewer mains and other improvements.³⁸ The New Urbanists, a much-publicized reformist group of architects and planners, favor junking most of the land-use regulatory scheme that has evolved over the course of the twentieth century.³⁹ The New Urbanist ideal, evident in a community such as Celebration at Disney World, consists of fine-grained mixed uses interspersed in a traditional small-town grid layout. For the most part the New Urbanism actually is the old urbanism, that is, a throwback to the sorts of communities market forces were generating in the lightly regulated environment of 1900.

Building codes provide many notorious instances of excessive land-use regulation.⁴⁰ A 1999 study of New York City, one of the most over-governed places in the United States, suggests a series of deregulatory measures that the authors estimate would reduce construction costs by 19% to 25%.⁴¹ A collection of war stories about code abuses has made the bestseller lists.⁴² I witnessed the costs of codes firsthand while serving during much of the 1990s on the committee charged with the renovation of the Yale Law School building. For that project, code officials insisted on

37. See Robert C. Ellickson, *Alternatives to Zoning*, 40 U. CHI. L. REV. 681, 691-711 (1973), the first article I published after joining the USC law faculty. Actually, John M. Ross, a student in one of my first USC courses, beat me to the punch. See John M. Ross, Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972). For an updated bibliography of scholarship critical of zoning, see ELICKSON & BEEN, *supra* note 28, at 722.

38. See ELICKSON & BEEN, *supra* note 28, at 486-90 (citing numerous sources).

39. See, e.g., ANDRES DUANY & ELIZABETH PLATER-ZYBERK, *TOWNS AND TOWN-MAKING PRINCIPLES* (1992); JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* (1993).

40. See NAT'L COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY*, H.R. DOC. NO. 91-34, at 254-72 (1968) (calling for drastic overhaul of the existing system); ELICKSON & BEEN, *supra* note 28, at 541-52 (citing additional sources).

41. JERRY J. SALAMA, MICHAEL H. SCHILL & MARTHA E. STARK, N.Y. UNIV. SCH. OF LAW, *REDUCING THE COST OF NEW HOUSING CONSTRUCTION IN NEW YORK CITY* xxi (1999).

42. See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* (1994).

the installation of exit signs in the crawl spaces of the building's attic, oversized sprinkler systems in the library, and wheelchair-accessible toilets in every bathroom (even when another accessible toilet would be available only a few feet away).

Cost-benefit analysts give similarly poor marks to project-based housing subsidy programs.⁴³ Assisted housing projects typically have been unduly costly to build and manage. A basic problem is that project subsidies weaken participants' incentives for socially efficient behavior. The landlord of a subsidized project is likely to be unresponsive to a project tenant (who cannot exit without forgoing the benefits of the subsidy); conversely, to keep the subsidy, a tenant household is likely to stay in residence long after the dwelling unit it occupies no longer is suited to its needs. No wonder that a leading study of housing assistance programs found that project-based subsidy programs tend to deliver only about forty to fifty cents of tenant benefits per government dollar spent.⁴⁴ Considerably less wasteful are the various tenant-based subsidy programs, notably the federal Section 8 program initiated in 1974.⁴⁵ A portable housing allowance enables a recipient tenant to shop for housing in the private market. Because housing allowances are more incentive-compatible than project-based assistance, they deliver to a tenant between sixty-five and ninety-four cents of benefits per dollar spent.⁴⁶ These last figures also suggest, of course, that even tenant-based housing assistance programs are likely to be less efficient than transfers of unrestricted cash. In sum, in many aspects of both land-use-regulation and housing-assistance policy, government-induced inefficiency is the order of the day.

III. WHY HAS LEVIATHAN GROWN SO LARGE?

Scholars have offered a wide variety of explanations for the expansion of the public sector during the twentieth century.⁴⁷ In this brief essay I

43. See ELLICKSON & BEEN, *supra* note 28, at 1049-54, 1057-70 (citing numerous sources); Stephen B. Kinnaird, Note, *Public Housing: Abandon HOPE, But Not Privatization*, 103 YALE L.J. 961 (1994).

44. Stephen K. Mayo, *Sources of Inefficiency in Subsidized Housing Programs*, 20 J. URB. ECON. 229, 242-47 (1986).

45. Housing and Community Development Act of 1974, Pub. L. No. 93-383, sec. 201(a), 88 Stat. 662-66 (codified as amended at 42 U.S.C. § 1437f (1994)).

46. Mayo, *supra* note 44, at 242-47.

47. See generally ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* (1987); John R. Lott, Jr. & Lawrence W. Kenny, *Did Women's Suffrage Change the Size and Scope of Government?*, 107 J. POL. ECON. 1163, 1165 (1999) (briefly identifying a wide range of theories of why government grew); Sam Peltzman, *The Growth of Government*, 23 J.L. & ECON. 209 (1980).

restrict my attention to three possible contributing causes: technological advances that increased wealth; the increasing vulnerability of governmental institutions to capture by special interests; and the onset of ideologies that favor activist government.

A. GOVERNMENT AS A SUPERIOR GOOD

In general, the more developed a nation's economy, the larger the roles of its governments.⁴⁸ In the jargon of economics, government thus appears to be a superior good, that is, something that grows in appeal as a population becomes richer. One reason, perhaps, is that many technologies that contribute to economic growth also create new externalities such as pollution and network dependencies. Thus, the advent of electricity-generation plants gives rise to demand for environmental regulation; of the skyscraper, for regulation of building heights; and so on. In addition, as basic human needs such as clothing, food, and shelter become more easily satisfied, people increasingly may seek to consume luxuries such as education (traditionally mostly government-provided in the United States), environmental quality, and redistribution to the poor. Accordingly, it is possible to view (at least some of) the growth of government regulatory and spending programs in the twentieth century as an adaptive response to rising wealth. This theory, however, fails to account for the manifest inefficiency of many government programs.

The diversity of theories can be illustrated by three not mentioned in the text of this Article. One is that World War I, the Great Depression, and other major crises ratcheted up the scope of governmental activity. HIGGS, *supra*, at 17–18. A shortcoming of this hypothesis is that American government did not ratchet up after the Civil War.

Another theory is that government grew in part on account of the extension of voting rights to women, whose relative economic insecurity is thought particularly to incline them to favor welfare spending. See Lott & Kenny, *supra*.

A third possibility is that the increasing efficiency of government tax collection systems has reduced political opposition to high rates of taxation. See GARY S. BECKER & CASEY B. MULLIGAN, DEADWEIGHT COSTS AND THE SIZE OF GOVERNMENT (Nat'l Bureau of Econ. Research, Working Paper No. 6789, 1998). Becker and Mulligan stress the advent of broad-based taxes with fairly flat rate structures. Legislators also may have gotten better at designing taxes that exploit the fiscal illusions of taxpayers. See Wallace E. Oates, *On the Nature and Measurement of Fiscal Illusion: A Survey*, in STUDIES IN FISCAL FEDERALISM 431 (Wallace E. Oates ed., 1991). To illustrate, people tend to be loss-averse. See Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993). Suffering the deduction of a given amount from one's paycheck therefore is likely to be less painful than writing a check for a tax payment of the same amount. If so, the advent of income-tax withholding and of mortgagee-administered property-tax escrow accounts would have reduced political opposition to tax increases.

48. See La Porta et al., *supra* note 4, at 266.

B. PUBLIC CHOICE THEORY

Why do inefficient government programs persist in a democracy, where political aspirants might be expected to win election by campaigning to eliminate waste? According to public choice theory, the explanation lies in asymmetries in the ability of the gainers and losers from government programs to organize themselves for political action.⁴⁹ An inefficient regulatory or spending program can be predicted to emerge and endure when its (relatively concentrated) beneficiaries have more influence than the (relatively diffuse) taxpayers and consumers whose interests are disserved by it.⁵⁰

This theory goes a long way toward explaining the persistence of many of the inefficient programs mentioned above. The arguments are familiar. The costs of exclusionary zoning fall on diffuse housing consumers and on (commonly voteless) owners of undeveloped land, while the benefits of exclusionary zoning inure to the homeowners who dominate the politics of most suburbs. A subdivision regulation that imposes wasteful street-width standards is likely to be strongly defended by the contractors who build streets. A building code with excessive sprinkler specifications is warmly embraced by pipe manufacturers, plumbers' unions, and firefighters.

Similar stories give insight into why wasteful spending programs endure. Project-based housing assistance programs, for instance, enable a politician to reward the highly organized contractors and professional housers who profit from these projects, at the expense of the poorly organized taxpayers and recipient tenants who would prefer tenant-based assistance. This asymmetry largely explains why Congress has refused to pull the plug on the much criticized public-housing and Low-Income Housing Tax Credit programs.⁵¹

49. Early classics in public choice theory include JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962), and George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON.* 3 (1971). Political scientists, of course, previously had been alert to interest-group politics. See, e.g., V.O. KEY, JR., *POLITICS, PARTIES & PRESSURE GROUPS* (1st ed. 1942).

50. To the extent that courts also are subject to political influence, public choice theory offers a partial explanation for twentieth-century judicial activism in creating new law, for example, in the fields of products liability and criminal procedure.

51. For more expansive discussion, see JOHN C. WEICHER, *PRIVATIZING SUBSIDIZED HOUSING* 43-44 (1997) (on politics of project-based subsidies generally); ELLICKSON & BEEN, *supra* note 28, at 1067-68 (on politics of Low-Income Housing Tax Credit program).

C. THE RISE OF PRO-GOVERNMENT IDEOLOGIES

Although public choice theory is broadly plausible, it generates no obvious explanation for why governmental activity would have begun to escalate in the early twentieth century. If concentrated interests can wreak much damage, why did they wait so long to do so? A third theory—despite some shortcomings—at least fits the chronology well.⁵² This theory supposes that ideas help drive events. It is notable that the prevailing ideology during the period 1898–1916 was laissez-faire. Thereafter Progressivism dethroned the ideology of limited government, and faith in governmental activism under the direction of experts went on to dominate American political thought throughout the balance of the twentieth century.⁵³

To be sure, many social scientists resist attributing causal force to ideas. The skeptics include, interestingly, both materialist Marxists and Chicago School economists.⁵⁴ These critics see ideologies not as *ex ante* independent causal factors but as *ex post* rationalizations for actions taken on the basis of material interest. For example, unlike Max Weber, who saw the flowering of capitalism partially as an outgrowth of the emergence of Protestant theology,⁵⁵ a pure materialist would suppose that the rise of capitalism itself had prepared the ground for the success of Protestantism. Nevertheless, many prominent analysts, including Friedrich A. Hayek and John Maynard Keynes,⁵⁶ have been willing to posit that systems of belief have some independent influence on events.⁵⁷ Indeed, there seems to be increasing support for this view.⁵⁸

52. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 75–117 (1982) (offering theory and evidence that, as time passes, interest groups increasingly dominate a stable society).

53. On Progressivism and its rise, see, for example, HIGGS, *supra* note 47, at 106–16.

54. See, e.g., Sam Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181, 184, 210 (1984) (an example of a Chicagoan economist's resistance to using ideology as an independent variable). An irony is that the work of both Marxists and Chicago School economists seems to be particularly influenced by their ideological perspectives.

55. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Charles Scribner's Sons 1958) (1920).

56. See HIGGS, *supra* note 47, at 15–17.

57. See, e.g., PETER BERGER & THOMAS LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE ON THE SOCIOLOGY OF KNOWLEDGE* (1966); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* 22–24, 111 (1990); Hugh Rockoff, *By Way of Analogy: The Expansion of the Federal Government in the 1930s*, in *THE DEFINING MOMENT*, *supra* note 2, at 125. See generally HIGGS, *supra* note 47, at 15–17, 35–56 (providing definitions of ideology and discussing its place in the study of political economy).

58. For studies that assert that a legislator's ideology influences his voting patterns, see, for example, Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*,

If an ideological shift can effect events, the next question naturally is: what causes ideological tides to change? On that important issue social scientists currently have little to offer. Rational-actor models suggest one possibility. It is commonly supposed that individuals employ ideologies to provide shorthand solutions to the complex problems that life presents. If individuals were smart, they would tend to abandon ideological tenets that had proven to be maladaptive. If so, a salient event that cast doubt on the worthiness of a prevailing ideological commitment might stimulate ideological change. For example, in and around the year 1900, ordinary Americans readily could observe that the laissez-faire approach was contributing to undesirable levels of cartelization and environmental externalities. Even before the Crash of 1929, there is evidence that these observations had begun to weaken many economists' faith in the laissez-faire creed and to strengthen their support for Progressivist government.⁵⁹

IV. WHITHER LEVIATHAN?

If these three variables—level of wealth, vulnerability to interest-group capture, and political zeitgeist—largely determine the size and scope of government, what does this portend for the twenty-first century? Not surprisingly, these three indicators generate mixed signals. Because it is a safe bet that the United States will grow richer, the proposition that government is a superior good suggests that the girth of government will continue to expand. It is unclear, however, whether future governments will be more (or less) vulnerable to interest-group capture. This largely will depend on the countervailing effects of new information technologies. The Internet (and its ilk) potentially will help voters obtain information needed to monitor elected officials. On the other hand, the Internet also will help concentrated interests organize for selfish lobbying. In addition, by opening up the distractions of the wider world, the new communications technologies may reduce the level of citizen attention to local political affairs. A neighborhood-based social network is an ideal foundation for effective monitoring against municipal malfeasance. If individuals' social networks increasingly come to be maintained via cable connection, and not on the basis of physical proximity, central cities in particular may become

74 AM. ECON. REV. 279 (1984); James B. Kau & Paul H. Rubin, *Self-Interest, Ideology, and Logrolling in Congressional Voting*, 22 J.L. & ECON. 365 (1979); Steven D. Levitt, *How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, 86 AM. ECON. REV. 425, 427 (1996). But cf. Peltzman, *supra* note 54 (asserting that legislators' votes turn less on ideology than on constituency characteristics and sources of political contributions).

59. See Rockoff, *supra* note 57, at 132-47.

increasingly vulnerable to interest-group influence.⁶⁰ On balance, the Internet therefore may contribute more to the expansion of municipal governments than of higher-level governments.⁶¹

The trend in the prevailing political zeitgeist may prove to be the most important determinant of the future size of government. Although this trend is far from clear, there are scattered indications that the Progressivist creed has been losing steam and that skepticism about activist government is on the rise.⁶² Even a Democratic President has found it politic to declare that the era of big government is over.⁶³ Political winds seem to be favoring market-based solutions to policy problems. Congress has shifted federal housing aid away from housing projects and toward market-based vouchers. Both Congress and the states have been deregulating airlines, banking, telecommunications, and power generation. Talk of school vouchers fills the airwaves. Cities are busily privatizing traditional municipal functions.⁶⁴

Politicians are responding, perhaps, to voters' increasing skepticism about the desirability of activist government. The Gallup Organization periodically has asked respondents whether in the future the biggest threat to the country will be "big government," "big business," or "big labor." In 1965, 35% of Gallup respondents replied that they regarded big government as the greatest threat of the three. By 1999, 65% said that they did.⁶⁵ It is notable that libertarian skepticism about the public sector seems to be especially prevalent among those involved in the new information technologies, the most dynamic sector of the economy. Even many left-

60. See Robert C. Ellickson, *Monitoring the Mayor: Will the New Information Technologies Make Local Officials More Responsible?*, 32 URB. LAW. (forthcoming 2000).

61. There is some evidence that the size of the federal government began to plateau after 1980. See LIGHT, *supra* note 23, at 177-78.

62. See, e.g., William E. Nelson, *The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy*, 25 HOFSTRA L. REV. 1 (1996) (noting that since 1940 judges increasingly have suspected that government programs mainly serve special interests); Rockoff, *supra* note 57, at 148-50 (reporting data indicating that after 1970 many economists became more skeptical about the wisdom of government interventions in the economy).

63. Bill Clinton included this sentence in his State of the Union address in 1996, an election year. William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 1996), in 32 WEEKLY COMP. PRES. DOC. 90 (Jan. 29, 1996).

64. See, e.g., STEPHEN GOLDSMITH, *THE TWENTY-FIRST CENTURY CITY: RESURRECTING URBAN AMERICA* 13-27 (1997) (describing innovations in Indianapolis); DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 76-107 (1992).

65. *Opinion Pulse*, AM. ENTERPRISE, Jan./Feb. 2000, at 68, 69. This result is partly, but hardly entirely, attributable to a falloff in the percentage who see big labor as the biggest threat; this declined from 29% to 8% between 1965 and 1999. *Id.*

leaning academics, after viewing the wreckage of statist experiments, have come to reject centralizing impulses.⁶⁶

There are, to be sure, still many who are eager to keep the Progressivist flame alive. A notable example is Garry Wills' *A Necessary Evil*, a sustained lament about what Wills sees as a persistent American strain of anti-governmentalism.⁶⁷ Wills properly stresses the value of institutions that provide collective goods, but errs in assuming that governments invariably do this best. Wills invokes a parable in which a wall must be erected to protect frolicking children from falling over a precipice.⁶⁸ But are governments the only institutions that can build walls? Might not an owner of private land along a precipice, whether out of moral compunction or fear of tort liability, seek to protect children from falling? Hasn't, say, the Disney Corporation been able to design play spaces where children can frolic in safety?

With little or no assistance from the state, people are able to create a language, conduct trade, impose informal social controls, and reward champions of the collective interest.⁶⁹ Wills would have been wiser to interpret the increasingly overt strain of antigovernmentalism in American culture not as a misguided crankiness, but rather as a deepening of insight into the relative competence of human institutions. If political winds indeed are shifting against Progressivism, twenty-first century politicians who propose to tame Leviathan may fare better than those who propose to give it yet more leash.

66. See, e.g., JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998).

67. GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* (1999).

68. See *id.* at 308.

69. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (stressing preeminence of informal norms in many social contexts); Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5 (1985) (reviewing private mechanisms for contract enforcement).